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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MELFORD BENNETT JORGENSEN, Petitioner, v. THE SUPERIOR COURT OF SANTA CRUZ COUNTY, Respondent, THE PEOPLE, Real Party in Interest.	H027440 (Santa Cruz County Super. Ct. No. AP1292)

I. INTRODUCTION

In this original proceeding, we consider whether the respondent court abused its discretion when it dismissed an appeal from a judgment of conviction in a misdemeanor case as a result of appellant's failure to timely file a proposed statement on appeal. Petitioner Melford Bennett Jorgensen, the appellant below, timely filed his notice of appeal and contends he demonstrated good cause for relief from his failure to file the statement on appeal, because despite his diligent efforts he was unable to retain appellate counsel to prepare the statement on appeal over the holiday season. We conclude that

respondent court abused its discretion under the circumstances of this case, and therefore extraordinary relief is warranted.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 26, 2003, Jorgensen was convicted of misdemeanor driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivisions (a) and (b). Jorgensen filed a timely notice of appeal in propria persona on December 23, 2003. However, Jorgensen failed to file a proposed statement on appeal before the 15-day filing period provided by California Rules of Court, rule 184(d), expired on January 7, 2004.[1] Instead, on January 7, 2004, Jorgensen filed an application for an extension of time to file a proposed statement on appeal. Jorgensen stated in his application that he had been unable to obtain appellate counsel over the Christmas and New Year holidays, and advised the court that he planned to meet with attorney Arthur Dudley the following week. The presiding judge of the appellate division denied the application on January 9, 2004.

The appellate division next set a hearing on February 19, 2004, on its own motion to dismiss the appeal for failure to file a proposed statement on appeal. However, before that date Jorgensen had managed to retain appellate counsel, who on January 29, 2004, filed an application for relief from default for failure to file a proposed statement on appeal. In his application, Jorgensen asserted there was good cause for relief, because his failure to file a proposed statement on appeal was not the result of neglect but rather his inability to obtain appellate counsel prior to January 7, 2004. Appellate counsel stated in

[1] Cal. Rules of Court, rule 184(d), provides in pertinent part, "Any appellant who desires to have a statement settled shall, within 15 days after filing notice of appeal, serve on the respondent and file with the trial court a proposed statement on appeal."

his supporting declaration that he had confirmed Jorgensen's diligent attempts to obtain appellate counsel.

However, Jorgensen's first attempt to obtain relief from default for failure to file a proposed statement on appeal was unsuccessful. On January 30, 2004, the presiding judge of the appellate division denied the application for relief from default. Jorgensen then filed a second application for relief from default, requesting the court to consider additional facts inadvertently omitted from his original application. Jorgensen stated that when he was convicted he was under the impression that his trial attorney would handle the appeal. However, as the time to file the notice of appeal approached, trial counsel informed Jorgensen that trial counsel would assist him only with the filing of the notice of appeal, and referred Jorgensen to several appellate attorneys. Jorgensen called three attorneys without any success sometime prior to December 23, 2003.

Jorgensen further stated that none of the appellate attorneys recommended by trial counsel were available over the holiday period. One attorney's office was open only limited hours and another attorney referred defendant to Arthur Dudley, whom Jorgensen telephoned numerous times between December 23, 2004 and January 7, 2004. Dudley told Jorgensen that he could not assist him immediately as he was preparing for a jury trial, and advised Jorgensen to file an application for an extension of time to file a proposed statement of appeal and then to call Dudley. Jorgensen did so, but despite numerous telephone calls he was unable to contact Dudley while he was in trial. Finally, on January 26, 2004, Dudley's office referred Jorgensen to Andrew Janecki, his current appellate counsel. The reapplication for relief from default was supported by the declaration of Janecki, who stated that he had confirmed the foregoing facts by speaking with the persons involved.

On February 6, 2004, the presiding justice of the appellate division denied the second application for relief from default for failure to file a proposed statement on appeal. The dismissal hearing remained set for February 19, 2004. In the meantime,

Jorgensen filed a petition in this court for a writ of mandate directing the appellate division to grant his application for relief from default. This court summarily denied the petition on February 18, 2004, as premature since the dismissal hearing was pending. When the dismissal hearing was held, the appellate division granted relief from default and ordered the statement on appeal to be filed within in seven days. Jorgensen timely filed his proposed statement on appeal the next day.

However, more procedural problems ensued when Jorgensen attempted to file the reporter's transcript on appeal. On February 27, 2004, Jorgensen filed an application for a 30-day extension of time, on the ground that the court reporter had advised him that due to the press of business she could not have the transcript ready until April 1, 2004. The presiding judge of the appellate division granted the application on February 27, 2004, and extended the time to April 5, 2004. However, when appellate counsel had heard nothing from the court reporter by March 26, 2004, he filed a second application for an extension of time to file the reporter's transcript, stating that he would be out of town until April 6, 2004, and was requesting an extension out of an abundance of caution.

The presiding judge of the appellate division granted a second extension of time and directed the reporter's transcript to be filed by April 15, 2004. However, on April 14, 2004, Jorgensen filed a third application for an extension of time to file the reporter's transcript. Appellate counsel stated in his declaration that the court reporter had advised him the transcript were not ready because she had experienced a delay due to new software, but that she was fairly confident that she could file the transcripts within the next 15 days.

The third application for an extension of time to file the reporter's transcript was denied by the presiding judge of the appellate division on April 19, 2004. The order includes a handwritten note: "Request for relief from default for failure to file a proposed statement on appeal was denied on 2-5-04." Thereafter, in an order filed April 27, 2004, the presiding judge dismissed the appeal. The order states, "Notwithstanding the

Appellate Division's ruling on February 19, 2004 to set aside the default and not to dismiss the appeal, the [presiding judge of the appellate division] orders the above-entitled appeal dismissed retroactive to February 5, 2004, when the second request for relief from default was denied. The remittitur shall issue forthwith." It does not appear that a hearing was held prior to issuance of the order dismissing the appeal.

Jorgensen challenged the dismissal order by filing in this court a petition for a writ of mandate directing respondent court to set aside its orders denying his applications for relief from default and for an extension of time to file the reporter's transcript on appeal and to allow his appeal to proceed. We issued a stay of Jorgensen's confinement pending our writ review and a *Palma* notice (*Palma* v. *U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180), advising the parties that this court was considering issuing a peremptory writ of mandate in the first instance and requesting points and authorities in opposition to the petition for writ of mandate. No opposition was received, and we now consider the merits of the petition for writ of mandate.

III. DISCUSSION

The question for this court is whether the presiding judge of the appellate division abused his discretion when he refused to grant relief from default for failure to file a proposed statement on appeal and dismissed Jorgensen's appeal. (See *In re Parker* (1968) 68 Cal.2d 756, 759.) Under the applicable rules of court, the presiding judge had the authority to grant relief. Rule 186(b) of the California Rules of Court allows the superior court to grant relief from default occasioned by any failure to comply with the rules pertaining to the time for filing the statement and reporter's transcript on appeal, upon a showing upon a showing of good cause.[2]

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[2] California Rules of Court, rule 186, states, "(a) [Extensions of time] The court from which the appeal is taken, or a judge thereof, may for good cause shown by affidavit make an order granting not more than a total of 15 days additional to the time limited in

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Relief from default for failure to file a proposed statement on appeal is guided by the policy of the appellate courts " ' "to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technical grounds." [Citation.]' " (*In re Parker*, *supra*, 68 Cal.2d at p. 760.) This goal is frustrated when an appeal is dismissed "on the basis of technicalities which reflect neither a conscious decision not to appeal nor inexcusable delay." (*People v. Acosta* (1969) 71 Cal.2d 683, 688-689.) Moreover, our Supreme Court has explained, " '[t]he interest of the state that justice be done in criminal cases reinforces an appellant's claim that his appeal be considered on the merits.' " (*Id*. at p. 685.)

Thus, California Supreme Court found good cause for relief from default for failure to timely file a statement on appeal where the failure was due to attorney error and "petitioner was hardly at fault . . . and a delay of four days in the filing of the statement was not detrimental. . . ." (*In re Parker*, *supra*, 68 Cal.2d at p. 761.) In contrast, where the delay in filing the proposed statement on appeal was determined to be intentional, relief from default was properly denied. (*In re Ridenour* (1973) 33 Cal.App.3d 792, 801.)

In the present case, we find that Jorgensen has shown good cause for relief from default. Despite his diligent efforts, Jorgensen had difficulty obtaining appellate counsel

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these rules for serving and filing the statement, or for filing the transcript and giving notice thereof, or for proposing amendments thereto, or for engrossing the statement or transcript, or both, and presenting the same for certification. The superior court to which an appeal is taken, or if the appeal is to be heard in an appellate department, the presiding judge thereof, may, for good cause shown by affidavit, further extend the time for doing any act required by these rules, except the time for filing the notice of appeal. Every such extension shall be made upon application as provided in rule 137 before the time extended, including any previous extensions thereof, has expired. [¶] (b) [Relief from default] The superior court may for good cause relieve a party from a default occasioned by any failure to comply with these rules, except failure to give timely notice of appeal."

to file a timely proposed statement on appeal, initially due to a misunderstanding as to whether his trial counsel would be handling the appeal, and subsequently due to the unavailability of appellate counsel over the holiday period. Jorgensen's diligence was shown, not only by his many contacts with potential appellate counsel, but also by his filing in propria persona of a timely notice of appeal and a timely application requesting an extension of time to file a proposed statement on appeal. Jorgensen also filed his first application for relief from default on January 29, 2004, 22 days after the January 7, 2004, due date for the proposed statement of appeal and one day after he finally was able to retain appellate counsel on January 29, 2004.

Accordingly, we conclude that the record provides ample evidence that Jorgensen wanted to file an appeal and that his delay in filing a proposed statement on appeal was excusable under the circumstances. Respondent court therefore abused its discretion when it denied Jorgensen's applications for relief from default and refused to hear his appeal on the merits, and Jorgensen is entitled to extraordinary relief.

The remaining question for this court is the form of writ relief that may be granted. It appears more common for writ relief from the dismissal of an appeal in a criminal case to be by way of habeas corpus. "In the absence of another adequate remedy, habeas corpus lies to correct the erroneous denial of a right to an effective appeal." (*In re Parker* 91968) 68 Cal.2d at p.760.) However, it is also well established that a writ of mandate will lie to correct a lower court decision "amounting to a denial of fair hearing on the merits." (*Brown Co. v. Appellate Department* (1983) 148 Cal.App.3d 891, 904; *Schweiger v. Superior Court* (1970) 3 Cal.3d 507, 518.) Thus, this court may properly grant relief by way of a writ of mandate.

We also have determined that a peremptory writ of mandate in the first instance is appropriate in this case. In limited situations, an appellate court may issue a peremptory writ in the first instance, without issuance of an alternative writ or order to show cause, and without providing an opportunity for oral argument. (Code Civ. Proc., § 1088; *Lewis*

v. Superior Court (1999) 19 Cal.4th 1232, 1252-1253.) "A court may issue a peremptory writ in the first instance ' "only when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue—for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or where there is an unusual urgency requiring acceleration of the normal process. . . ." [Citation.] ' [Citation.] " (*Lewis v. Superior Court*, *supra*, 19 Cal.4th at p. 1241, quoting *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223.)

Before issuing a peremptory writ in the first instance, we must comply with certain procedural requirements. Code of Civil Procedure section 1088 " ' "requires, at a minimum, that a peremptory writ of mandate or prohibition not issue in the first instance unless the parties adversely affected by the writ have received notice, from the petitioner or from the court, that the issuance of such a writ in the first instance is being sought or considered. In addition, an appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party or parties adversely affected." ' " (*Lewis v. Superior Court*, *supra*, 19 Cal.4th at p. 1240.)

We have complied with these requirements in the present case by providing notice that this court was considering issuance of a peremptory writ in the first instance and requesting points and authorities in opposition to the petition. No opposition was filed, and we further conclude that a peremptory writ in the first instance is appropriate to correct the trial court's order expeditiously so that Jorgensen's criminal appeal may be heard on the merits.

IV. DISPOSITION

Let a peremptory writ of mandate issue directing the appellate division of respondent court to recall its remittitur, to permit appellant Melford Bennett Jorgensen to file a statement on appeal and the reporter's transcript on appeal, and to decide the appeal

on the merits. This opinion is made final immediately as to this court. (Cal. Rules of Court, rule 24(b)(3).) The order staying Jorgensen's confinement shall remain in effect until the appeal is finally determined.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.